

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MICHAEL J. TALLEY and
SUSAN TALLEY, husband
and wife,

Plaintiffs,

v.

TRI-STATE WASTE SOLUTIONS,
INC., a Delaware corporation, and
GEORGE T. COLLINS, SR.,

Defendants.

C.A. No. 05C-08-311-PLA

UPON CONSIDERATION OF PLAINTIFFS' MOTIONS
IN LIMINE TO EXCLUDE DEFENDANTS' EXPERT
DENIED.

Submitted: June 7, 2007

Decided: June 25, 2007

James T. Perry, Esquire and Michael L. Sensor, Esquire, Perry & Sensor,
Wilmington, Delaware. Attorneys for Plaintiffs.

Michael K. Tighe, Esquire, Tighe & Cottrell P.A., Wilmington, Delaware.
Attorney for Defendants.

ABLEMAN, JUDGE

I.

Before the Court are two motions in limine filed by Michael J. Talley and Susan Talley (collectively “Plaintiffs”). The motions seek to exclude the expert proffered by Tri-State Waste Solutions, Inc. and George T. Collins, Sr. (collectively “Defendants”). Specifically, Plaintiffs’ motions are as follows: (1) Motion in Limine to Exclude all Testimony and Opinions of Defendants’ Non-Delaware-Licensed Engineering Expert, Thomas P. Lacek, P.E.,¹ and (2) Motion in Limine Pursuant to D.R.E. 702 and *Daubert* and its Progeny to Exclude All Expert Testimony, Opinions, and Other Evidence to be Presented by Defendants’ Liability Expert, Thomas P. Lacek, P.E.² Since the two motions seek to exclude the same expert, and because both motions implicate D.R.E. 702 and *Daubert*,³ the Court finds it appropriate to consider the motions together. For the reasons that follow, Plaintiffs’ motions are **DENIED**.

¹ Docket 56. “Docket [#]” refers to the number assigned by LexisNexis File & Serve.

² Docket 66.

³ See *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993). Plaintiffs’ first motion questions the qualifications of Defendants’ expert, while the second motion questions the relevancy and reliability of the expert’s findings.

II.

On March 3, 2004, Mr. Talley was operating a motorcycle and traveling eastbound on Nottingham Road approaching the intersection of Jackson Hall Road. A trash-hauling truck, owned by Tri-State Waste Solutions, Inc. and operated by George T. Collins, Sr., was traveling westbound on Nottingham Road and was preparing to make a left turn onto Jackson Hall Road. Mr. Collins began to initiate the truck's left turn, unaware of Mr. Talley's approaching motorcycle until it was too late. The motorcycle collided with the truck. Mr. Talley suffered severe injuries, including the amputation of a leg. Plaintiffs subsequently filed this negligence action against the Defendants.⁴

To refute Plaintiffs' claims, Defendants employed the services of Thomas P. Lacek, P.E. After performing an investigation and analysis of the accident, Mr. Lacek authored an "Engineer's Report" wherein he concludes the following: Mr. Talley was not visible to Mr. Collins when Mr. Collins began his left turn; Mr. Talley was driving about 6 miles per hour over the posted 45 mile per hour speed limit; Mr. Talley had sufficient time and distance to avoid the collision; Mr. Talley did not brake efficiently or

⁴ See Docket 2.

properly; and Mr. Talley was driving unsafely and, as a result, caused the collision.⁵

III.

Plaintiffs now seek to exclude Mr. Lacek. They contend that Mr. Lacek should not be permitted to testify as an expert because he is not a Delaware licensed engineer; that is, he is not registered pursuant to the Delaware Professional Engineers Act.⁶ Consistent with that argument, Plaintiffs further claim that Mr. Lacek's testimony, reports, crash simulations, and other evidence should be precluded because Mr. Lacek relied on information that was obtained by other non-Delaware licensed engineers in Mr. Lacek's firm; specifically Robert Jones, P.E. and Joseph Hudak, P.E.⁷ As support for the proposition that engineers not licensed and registered in Delaware are prohibited from testifying as experts, Plaintiffs cite to this Court's decisions in *Burkett-Wood v. Haines*⁸ and *Livesay v. Heagy*.⁹ In both *Burkett-Wood* and *Livesay*, this Court held that the

⁵ See Docket 66, Ex. B, p. 10.

⁶ See 24 Del. C. Chapter 28.

⁷ See Docket 56.

⁸ 2006 WL 1579770 (Del. Super. Ct. May 2, 2006).

⁹ 2004 WL 3928262 (Del. Super. Ct. Dec. 20, 2004).

proffered expert “was not qualified to offer engineering testimony as he was not registered pursuant to 24 *Del C.* Chapter 28.”¹⁰

Plaintiffs also claim that Mr. Lacek’s conclusions are factually erroneous, physically impossible, and will ultimately confuse the jury. In particular, Plaintiffs argue the following: Mr. Lacek erred by relying on the investigating police officer’s “point of impact” finding which, according to Plaintiffs, was clearly flawed because it is a “physical impossibility” for the “point of impact” to be where the officer says it occurred; Mr. Lacek did not ensure that his calculations were reasonably based on the actual vehicles and factors involved in the accident; Mr. Lacek only went to the scene of the accident one time and, when there, did not attempt to verify any of the measurements he used for his calculations; and Mr. Lacek used a computer program (“PC Crash 2”) to analyze the accident despite the fact that the computer program is not designed to reconstruct accidents but is rather used to calculate crash speeds. In sum, Plaintiffs’ maintain that Mr. Lacek should be precluded from testifying because he “at best” has provided an opinion about a hypothetical accident which is only loosely tied to the instant case. That is, there are so many variables missing from Mr. Lacek’s opinions, and

¹⁰ *Burkett-Wood*, 2006 WL 1579770, at *3. *See also Livesay*, 2004 WL 3928262, at *4 (“The Court concludes [the expert] is not qualified to offer engineering testimony as he is not registered pursuant to 24 *Del. C.* Chapter 28.”).

his underlying assumptions are so seriously flawed, that his testimony will be of little use to a jury. This, according to Plaintiffs, is precisely the type of evidence strictly forbidden by *Daubert* and its progeny. Therefore, Plaintiffs ask that Mr. Lacek's opinions and all evidence derived therefrom, including the accident simulations, accident diagrams, and all expert testimony, be excluded from introduction at trial.¹¹

Defendants respond by insisting that Mr. Lacek *is* qualified to testify in this Court. Defendants affirm that Mr. Lacek has been a licensed engineer in Pennsylvania since 1979, is qualified as a biomechanical engineer, has analyzed approximately 150 accident reconstructions a year since 1993, has been qualified as an expert in Delaware on eight previous occasions, has been permitted to testify as an expert in several nearby states, and is a member of numerous professional engineering societies. Defendants oppose Plaintiffs' contention that Mr. Lacek can not testify simply because he is not licensed in Delaware. Defendants reason that *Burkett-Wood* and *Livesay* are not controlling here because, under *Grace v. Morgan*,¹² engineering experts not licensed in Delaware can testify when their testimony is not the exclusive province of engineers. According to Defendants, that is precisely

¹¹ See Docket 66.

¹² 2006 WL 2065172, at *6 (Del. Super. Ct. July 25, 2006).

the case here as Mr. Lacek intends to testify regarding matters involving the law of physics, which is not necessarily within the province of engineering. In addition, Defendants cite to *Robbins v. Porter*¹³ as an instance when this Court declined to follow the *Livesay* decision and instead held that the proffered engineering expert was qualified to testify even though he was not licensed in Delaware. In all, Defendants urge the Court to direct its inquiry into Mr. Lacek's qualifications, not just the particular licenses he holds.¹⁴

In response to Plaintiffs' claims that Mr. Lacek's conclusions are erroneous, impossible, and will confuse the jury, Defendants contend that Mr. Lacek is entitled to testify because his findings are based upon information reasonably relied upon by experts in the engineering field. In fact, according to Defendants, both Mr. Lacek and Plaintiffs' expert have relied upon the same information in formulating their opinions. Both experts, for instance, rely extensively upon the investigating police officer's report and his "point of impact" finding. Defendants further argue that Mr. Lacek's testimony is based on calculations and data he personally verified, and that the computer program he used is an accepted program that can

¹³ C.A. No. 04C-06-289.

¹⁴ See Docket 69.

quantify crash speeds and perform accident reconstructions. Therefore, Defendants maintain that Mr. Lacek's opinions are relevant and reliable.¹⁵

IV.

The Court "serves as the gatekeeper for expert testimony."¹⁶ This gatekeeping function requires that the Court only allow a "witness [to] testify as an expert when [the witness is] qualified as an expert and [when] the witness has scientific, technical or other specialized knowledge that will assist the trier of fact[.]"¹⁷ To reach these admissibility determinations, the Delaware Supreme Court has crafted a "five-step test."¹⁸ This test provides that a witness' proffered opinion testimony will be admissible if this Court makes the following findings: (i) the witness is qualified as an expert by knowledge, skill, experience, training or education; (ii) the evidence is relevant and reliable; (iii) the expert's opinion is based upon information reasonably relied upon by experts in the particular field; (iv) the expert testimony will assist the trier of fact to understand the evidence or to

¹⁵ See Docket 73.

¹⁶ *Potter v. Blackburn*, 850 A.2d 294, 299 (Del. 2004).

¹⁷ *Eskin v. Carden*, 842 A.2d 1222, 1227 (Del. 2004). See also D.R.E. 702.

¹⁸ See *Eskin*, 842 A.2d at 1227.

determine a fact in issue; and (v) the expert testimony will not create unfair prejudice or confuse or mislead the jury.¹⁹

V.

In applying the “five-step test” to this case, the Court finds Mr. Lacek’s proffered testimony admissible.

First, Mr. Lacek has the knowledge, skill, experience, training and education to qualify as an expert in engineering. He has been a licensed engineer in Pennsylvania since 1979, has been involved in approximately 150 accident reconstruction projects *per year* since 1993, and has been qualified as an engineering expert on eight previous occasions in Delaware courts. Therefore, his background and qualifications certainly elevate him to the level of expert in engineering matters.

The Court is not persuaded by Plaintiff’s argument that Mr. Lacek should be precluded from testifying simply because he is not licensed in Delaware. With that said, the Court declines to follow the *Burkett-Wood* and *Livesay* decisions. The Delaware Professional Engineering Act (“Act”) states that the purpose of the Act is to safeguard life, health, and property

¹⁹ See *Eskin*, 842 A.2d at 1227. See also *Daubert*, 509 U.S. 579; *Kuhmo Tire Co. v Carmichael*, 526 U.S. 137 (1999); *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513 (Del. 1999).

and to promote the public welfare.²⁰ Permitting a more than qualified Pennsylvania licensed engineer to testify in this Court as an expert is in no way at odds with that stated purpose. That is to say, the citizens of Delaware are not at risk simply because Mr. Lacek performed an assessment of an accident and will testify as to his findings in this Court. The Act was never intended to override the Court's gatekeeping function under D.R.E. 702 or affect the Court's analysis under *Daubert*. Therefore, the Court finds that Mr. Lacek's lack of a Delaware engineering license does not by itself disqualify him from testifying as an expert in this case.

The same holds true for Plaintiffs' complaints regarding Mr. Jones and Mr. Hudak. The fact that Mr. Lacek may have utilized information obtained by these non-Delaware licensed engineers is of no consequence. The licensing status of Mr. Jones and Mr. Hudak, who are both engineers employed by the same firm as Mr. Lacek, has no impact on the Court's analysis of Mr. Lacek's qualifications. That is, the mere fact that Mr. Jones and Mr. Hudak are not Delaware licensed engineers does not necessarily disqualify Mr. Lacek from testifying.²¹

²⁰ 24 *Del. C.* § 2802.

²¹ It is important to note that Mr. Lacek personally verified all of the information he received from Mr. Jones and Mr. Hudak. Their involvement, therefore, has no bearing on the Court's analysis of the reliability of Mr. Lacek's opinions.

Next, the Court finds Mr. Lacek's opinions reliable. The underlying factual basis for Mr. Lacek's opinions, as articulated in his written report, consisted of the following: requisition for Mr. Collins to attend Delaware safety certified defensive driving course; police collision report; police driver information exchange form; statements from Mr. Collins, David Derrickson (witness), and Timothy Stoeckle (witness); affidavits of Mr. Stoeckle, Mr. Collins, Mr. Talley, Mrs. Talley, Mr. Derrickson; photos of Defendants' truck, Mr. Talley's motorcycle, and the accident scene; accident site inspection by Mr. Hudak; and the report prepared by Frank Costanzo (Plaintiff's expert). Mr. Lacek appears to have used this data and information, and referenced several authoritative texts, as a foundation when performing his mathematical and analytical analysis. Such a foundation and analysis is adequate and imparts an objective and sound methodology in the formulation of Mr. Lacek's opinions. What is more, the data and information relied upon by Mr. Lacek appears to be the type of information that would be reasonably relied upon by other experts in the engineering field when performing an accident reconstruction analysis.

Contrary to Plaintiffs' arguments, the fact that Mr. Lacek relied upon the "point of impact" finding by the investigating officer, did not take measurements when visiting the site of the accident, and used a computer

program that is generally not used for accident reconstruction, does not make his opinions unreliable. Rather, these are facts that can be brought out during the Plaintiffs' cross examination of Mr. Lacek in an attempt to impeach his testimony.

Lastly, Mr. Lacek's opinions are relevant. His opinions on how and why the accident occurred and which party was at fault will assist the jury in understanding the evidence and/or determining a fact in issue.²² Such testimony will not create unfair prejudice or confuse or mislead the jury.

VI.

Based on the foregoing: (1) Plaintiffs' Motion in Limine to Exclude all Testimony and Opinions of Defendants' Non-Delaware-Licensed Engineering Expert, Thomas P. Lacek, P.E., is **DENIED**; and (2) Plaintiffs' Motion in Limine Pursuant to Del. R. Evid. 702 and *Daubert* and its Progeny to Exclude All Expert Testimony, Opinions, and Other Evidence to be Presented by Defendants' Liability Expert, Thomas P. Lacek, P.E., is **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary

²² See *State v. McMullen*, 900 A.2d 103, 113 (Del. Super. Ct. 2006) (citation omitted) (“[E]xpert testimony must be relevant by requiring that it ‘assist the trier of fact to understand the evidence or to determine a fact in issue.’”).